IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:20.04.2007

CORAM:

THE HONOURABLE MR. JUSTICE V. DHANAPALAN

W.P. No.12104 of 2004 & W.P.M.P. No.14154 of 2004

M.M.T.C. Limited
"Chennai House"
No.6, Esplanade
Chennai - 600 108 Petitioner

vs.

The Commercial Tax Officer
Rattan Bazaar
Assessment Circle
I Floor, Kuralagam Annexe
Chennai - 600 108 Respondent

Writ petition filed under Article 226 of the Constitution of India for issuance of a writ of certiorari as stated therein.

For petitioner Mr. K. Ramagopal

For respondent Mr. Haja Naziruddin
Special Government Pleader (Taxes)

O R D E R

The petitioner seeks a writ of certiorari calling for the records in Proceedings T/0300163/1999-2000 on the file of the respondent and to quash his order dated 11.03.2004.

2. The case of the petitioner, in short, is as under:

a. The petitioner is a Government of India undertaking established for importing goods into this country. The petitioner, by entering into contracts with dealers who intend to import various items of goods, makes arrangements for the same and collects commission for the service it renders. In other words, the petitioner imports goods specifically for customers who have entered into contract with it for import of goods and such sales by the petitioner have been treated by the Sales Tax authorities as sales in the course of import and exempt under Section 5 of the Central Sales Tax, 1956.

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b. While so, a proprietary concern by name Royal Trading Company (in short "RTC") had placed an order with one

Sinexim Co. (P) Limited, Singapore for purchase of 12000 metric tonnes of Dun Peas grown in Australia @ USD 208.50 per metric tonne. As RTC did not have the requisite expertise for importing such goods, it had approached the petitioner's branch at Kolkata to arrange the imports and accordingly, a Memorandum of Understanding (MOU) was entered into between MMTC, Kolkatta and RTC on 15.03.1999. As per Clause 7 of the MOU, MMTC, Kolkatta would be entitled to a margin of 1% of C.I.F. value shown in the B/L for its services and as per Clause 8, the sales tax liability would be borne by RTC and based on this MOU, Dun Peas were shipped to Tuticorin Port from Singapore.

c. RTC appointed M/s. S.I. Paramasiva Nadar & Sons as its C & F Agent at Tuticorin and M/s. Manish Mercantile Agency, Chennai (in short "MMA") as its Selling Agent to sell the imported Dun Peas. MMA sold the consignment in Tamil Nadu for Rs.13,29,54,886/- and paid a sum of Rs.53,18,195.44 as Sales Tax to the CTO, Peddunaickenpet, South Assessment Circle. The Enforcement Wing officials, after an investigation into the import of Dun Peas, had sent a D3 proposal to the respondent determining the tax payable and the penalty leviable enabling the respondent to complete the assessment on the petitioner. On the basis of D3 proposal, the respondent issued a pre-assessment notice dated 19.02.2002 to the petitioner proposing to levy sales tax @ 4% on Rs.12,41,73,930/- and also sales tax on sale of spandex yarn at the rate of 8% per annum instead of 2% in addition to levy of penalty of 150% of tax under Section 12(3)(b) of TNGST Act. The petitioner, in turn, submitted his reply dated 06.05.2002 stating that the purchases made on behalf of RTC, and its sister concerns BHP Pvt. Ltd. and Bhura Exports Pvt. Ltd. represented sales in the course of import and could not be taxed under TNGST Act. The petitioner further stated in its reply that MMA had already paid a sum of Rs.53,34,829/- as single point tax payable on the first sale of Dun Peas in Tamil Nadu.

d. In addition to the petitioner's written reply, its Accountant also had met one Bhaskaran, the then CTO and explained him that the levy was unjust. Convinced with his explanation, the then CTO has reportedly written to the Dy. Commissioner, Commercial Taxes, Chennai Division on 30.04.2003 for permission to drop the proposal to levy tax on Dun Peas, with a copy marked to the CTO, Tuticorin, who, in turn, did not agree with the proposal for deviation and reportedly, the Commissioner of Commercial Taxes, being seized of the matter, had directed the respondent to complete the assessment as per D3 proposal, without going into the merits of the case and thus, the present impugned order dated 11.03.2004 has been passed by the respondent, not heeding to the request made by the petitioner for an opportunity of hearing to explain its case.

3. According to the respondent, during the course of vehicular check at Tuticorin, S.I. Paramasivam Nadar & Sons were found clearing the imported Dun Peas at the Tuticorin Port on behalf of the petitioner and sale bills in respect of the consignment were raised by another dealer as second sales and verification of the documents

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revealed that the petitioner imported 13070.940 M.T. of Dun Peas and Bill of Entries were also filed in the name of the petitioner.

4. It is the further case of the respondent that after receiving the value of the goods by cheque, the petitioner had issued delivery orders directing Paramasivam Nadar & Sons to deliver the goods to BHP India (P) Ltd. and as such, the petitioner had effected sales to BHP India (P) Ltd. which amounts to sales within Tamil Nadu and hence, the impugned transactions are liable to tax under TNGST Act. Thus, it is the case of the respondent that after issuance of a pre-assessment notice dated 19.02.2003 and after duly considering the objections filed by the petitioner, the detailed assessment order dated 11.03.2004 was passed levying a tax of Rs.59,98,869/- and a penalty of Rs.1,21,06,958/- and the same is perfectly in order and does not warrant interference.

5. Heard Mr. K. Ramagopal, learned counsel for the petitioner and Mr. Haja Naziruddin, learned Special Government Pleader (Taxes).

6. The first and foremost contention of Mr. Ramagopal is that the respondent has not acted independently and has rather been influenced by the Enforcement Wing which had directed the levy and hence, the impugned order is liable to be quashed. Secondly, it is his strenuous contention that Dun Peas has been imported by Kolkata buyers and the petitioner had only played the role of an agent of RTC, Kolkata in import for service charge of 1% of CIF value of Dun Peas and as such, the purchase made by RTC, Kolkata should have been treated only as purchase in the course of import which is not liable to tax under the TNGST Act and the consequent penalty of Rs.1,21,06,958/- also should not have been levied. Finally, the counsel for the petitioner has contended that the levy of tax at the rate of 8% on spandex yarn is arbitrary as there was no branch transfer of spandex yarn, as observed by the respondent.

7. The counsel for the petitioner, in support of his contention that the respondent, a quasi-judicial authority should have acted independently without being influenced by his superiors, has relied on a judgment of the Supreme Court reported in AIR 1958 SC 667 in the matter of Mahadayal Premchandra vs. Commercial Tax Officer, Calcutta and another and the relevant para reads as under: (para 19):

> "We are really surprised at the manner in which the first respondent dealt with the matter of this assessment. It is clear that he did not exercise his own judgment in the matter and faithfully followed the instructions conveyed to him by the Assistant Commissioner (C.S.) without giving the appellants an opportunity to meet the points urged against them. The whole procedure was contrary to the principles of natural justice. The procedure adopted was, to say the least, unfair and was calculated to undermine the confidence of the public in the impartial and fair administration of the Sales Tax Department concerned. . ."

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8. In the same context, further reliance has been placed by the counsel for the petitioner on a judgment of the Supreme Court reported in AIR 1968 SCR 245 in the matter of Orient Paper Mills Limited vs. Union of India in which the relevant portion reads as under:

> "No authority however high placed can control the decision of a judicial or a quasi judicial authority. That is the essence of our judicial system. There is no provision in the Act empowering the Board to issue directions to the assessing authorities or the appellate authorities in the matter of deciding disputes between the persons who are called upon to pay duty and the department. It is true that the assessing authorities as well as the appellate authorities are judges in their own cause; yet when they are called upon to decide disputes arising under the Act, they must act independently and impartially."

9. Further reliance has been placed by the counsel for the petitioner on a judgment of this Court reported in (2005) 140 STC 97 in the matter of Pizzeria Fast Foods Restaurant (Madras) Pvt. Ltd. vs. Commissioner of Commercial Taxes, Chennai and Others on his contention that a quasi-judicial authority cannot be bound by the orders of his superiors and the relevant portion reads as under:

> "However, when the sales tax authorities are acting in a judicial or quasi-judicial capacity, in our opinion, they cannot be bound by the order of the Commissioner, they cannot be bound by the order of the Commissioner, because to take a contrary view would mean interference by the executive in a judicial function. When the assessing authority under the Sales Tax Act (or the appellate authority) decides a case, he is functioning in a judicial capacity (even though he may be a sales tax authority. Hence, when he is acting in a judicial capacity, he should not feel bound by any clarification issued by the Commissioner, as such clarifications under Section 28-A are not binding on him when he is functioning in a judicial capacity, and they are only binding when he is functioning in an administrative capacity, when initially fixing the rate of tax on a specific commodity."

10. To substantiate his contention that an opportunity of hearing was not given to the petitioner which amounts to violation of principles of natural justice and as such, the writ petition would lie notwithstanding the availability of an alternative remedy, the learned counsel for the petitioner has relied on a judgment of the High Court of Orissa at Cuttack reported in (1999) 115 STC 478 in the matter of Sidhartha Engineering Pvt. Limited vs. Assistant Commissioner of Sales Tax and Another and the relevant paragraph reads as under: (paragraph 9)

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> ". . . There are certain exceptions to general rule that a person must exhaust statutory remedies before seeking issuance of a writ. One of such exceptions is where there has been violation of principles of natural justice. It would all depend upon circumstances of the case where court would entertain a writ application, notwithstanding availability of an alternative remedy. In view of the undisputed factual position that petitioner was not granted an opportunity before extra demand was raised, we entertain the writ application for adjudication."

11. In support of his contention that the High Court can interfere if gross injustice is done notwithstanding existence of remedies by way of appeal or revision, the counsel for the petitioner has relied on the judgment of the Supreme Court reported in (2001) 122 STC 594 in the case of State of Tripura vs. Manoranjan Chakraborty & Others: (paragraph 4)

> ". . . It is of course clear that if gross injustice is done and it can be shown that for good reason the court should interfere, then notwithstanding the alternative remedy which may be available by way of an appeal under Section 20 or revision under Section 21, a writ court can in an appropriate case, exercise its jurisdiction to do substantive justice. Normally of course the provisions of the Act would have to be complied with, but the availability of the writ jurisdiction should dispel any doubt which a citizen has against a high-handed or palpable illegal order which maybe passed by the assessing authority."

12. Per contra, Mr. Haja Naziruddin, learned Special Government Pleader (Taxes) has contended that the question as to whether the impugned transactions are import sales coming under the purview of Section 5(2) of the Central Sales Tax, 1956 or local sales subject to sales tax, is a question of fact and the same cannot be decided in the present writ petition and as such, it is liable to be dismissed in limine on the ground that the petitioner has by-passed the statutory appellate remedy available to it. In support of this contention, the learned counsel has placed reliance on a judgment of the Supreme Court reported in (1997) 105 STC 318 in the matter of State of Goa and others vs. Leukoplast (India) Ltd. and the relevant para reads as under: (para 13)

> "In our view, whether the products manufactured by the assessee can be treated as "drugs or medicines" cannot be answered straightaway. The medicinal content of the products, if any, has to be ascertained. Its curative function has to be found out. Can the product be called a medicament at all? Is it

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used to cure or alleviate or to prevent disease or to restore health or to preserve health? Are these products treated as drugs or medicines in common parlance? These are basically questions of fact. There was no reason for the assessee-company to by-pass the statutory remedy and come to the court with a writ petition. These questions basically of fact should be agitated before the statutory appellate authority."

13. The learned Special Government Pleader (Taxes) has placed further reliance in support of his contention that the petitioner should not have filed the present writ petition when he has got appellate remedy, on a judgment of the Supreme Court (1983) 53 STC 315 in the matter of Titaghur Paper Mills Co. Ltd. and another vs. State of Orissa and another and the portion necessary for consideration runs as under:

> "We are constrained to dismiss these petitions on the short ground that the petitioners have an equally efficacious alternative remedy by way of an appeal to the prescribed authority under sub-section (1) of Section 23 of the Act, then a second appeal to the Tribunal under sub-section (3)(a) thereof, and thereafter in the event the petitioners get no relief to have the case stated to the High Court under Section 23 of the Act..."

14. Rebutting the contention advanced by the counsel for the petitioner that the petitioner was only rendering service for a service charge of 1% of CIF value of Dun Peas, the learned Special Government Pleader (Taxes) has contended that when Clause 15 of the MOU between the petitioner and RTC clearly stipulates that delivery order will be issued by MMTC in favour of RTC and that sale proceeds would be released by MMTC to RTC at a selling price fixed by MMTC, the petitioner cannot agitate that it was acting only as an agent of RTC for import of Dun Peas. To substantiate his contention that the petitioner is the first seller of Dun Peas in the State, he has pointed out that the delivery orders issued by the petitioner would clearly show that they were issued only on receipt of full payment with unequivocal direction to Paramasivam Nadar & Sons to deliver the goods to the persons named therein and thus, the petitioner is estopped from contending that it has acted only for and on behalf of RTC. It is further contended by the Special Government Pleader (Taxes) that the commission sale agreements entered into between BHP (India) Pvt. Limited and MMA cannot have any evidentiary value since the same has not been signed by either of the parties.

15. I have given careful thought to the submissions made by the learned counsel on either side.

16. While it is the case of the petitioner that it acted only as an intermediary between RTC and Sinexim Co. Pte. Ltd., Singapore in the import of Dun Peas made by the former as per the MOU entered into between the petitioner and RTC, it is the case of the respondent

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that it is only the petitioner which had imported Dun Peas from Singapore and had sold the same to dealers in Tamil Nadu and the documents on the side of the petitioner are only found to have been built up subsequent to investigation by Enforcement Wing and formulation of D3 proposals. Similarly, when the petitioner has contended that RTC has appointed Paramasivam Nadar & Sons as RTC's agent, it is the contention of the respondent that the said Agent has acted on behalf of the petitioner. To ascertain as to under whom Paramasivam Nadar & Sons were acting as agent, there is no record placed before this Court.

17. Though the petitioner has contended that the respondent, while passing the impugned order, has acted under the influence of the Commissioner of Commercial Taxes, who had directed him to complete the assessment as per D3 proposal, without going into the merits of the case, it has not let in, as evidence, any record, to that effect. The only documents available in this regard are the letter dated 30.04.2003 sent by the erstwhile Commercial Tax Officer, Chennai to the Dy. Commissioner, Commercial Taxes, explaining that the impugned transactions are not subject to sales tax and the reply dated 13.12.2003 from the Commercial Tax Officer - II, Tuticorin stating that the impugned transactions are liable to be taxed under the TNGST Act. From these available records, this Court can, no way, come to any conclusion that the respondent had been influenced by the Commissioner of Commercial Taxes.

18. While the petitioner has contended that RTC had appointed MMA as their selling agents vide agreement dated 30.04.1999 which is found in page 12 of the typed-set of papers, the respondent, on the other hand, on the basis of Delivery Orders issued by MMTC, has contended that MMTC had effected first sales to MMA. Though the respondent has countered that the said agreement between RTC and MMA cannot have evidentiary value since the same has not been signed by both the parties, a perusal of the agency agreement shows that it has been signed by the parties concerned.

19. According to the petitioner, it was not given an opportunity of being heard; but according to the CTO, Tuticorin, when the petitioner was summoned, there was no response and the documents which were produced before the Assessing Officer, Chennai were not produced before him which makes it clear that the records which were produced before the CTO, Chennai were only found to have been built up after the issue was investigated and subsequent to formulation of D3 proposals.

20. To summarise, the point for consideration in this petition is whether the impugned transactions of the petitioner constitute import for and on behalf of RTC or local sales as contended by the respondent and to arrive at a finding on this point, the following questions have to be answered:

a. whether Paramasivam Nadar & Sons are an agent of the petitioner or RTC?

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b. whether MMA is really an agent of RTC?

c. whether documents such as MOU between the petitioner and RTC, agency agreement between RTC and MMA were bona fide ones or they were built up after the issue was investigated by the Enforcement Wing, as contended by the respondent?

d. according to the petitioner, whether there is any evidence to show that the Deputy Commissioner or Commissioner of Commercial Taxes has influenced the respondent to complete the assessment of the petitioner based on D3 proposal without going into merits of the case?

e. whether an opportunity of personal hearing was afforded to the petitioner before issuance of the impugned order?

21. It is to be pointed out in this context that answers to the above questions could be found only on the basis of certain important documents such as Bill of Lading, Bill of Entry, Delivery Orders issued by MMTC and so on, which have not been produced by either side to substantiate their respective case. Undisputedly, these are all purely ticklish disputed questions of fact. The learned counsel for the petitioner has contended that this Court can exercise its extraordinary jurisdiction under Article 226 of the Constitution of India in the event of gross injustice inflicted on a party, by placing reliance on the judgment of the Supreme Court reported in (2001) 122 STC 594 in the case of State of Tripura vs. Manoranjan Chakraborty & Others (supra). In the case on hand, in the absence of relevant records on the file of this Court to find out answers to the questions, as already stated, based on which the point for consideration has to be determined, it cannot be concluded that any injustice much less grave injustice has been inflicted on the petitioner by the respondent. As such, the reliance placed by the counsel for the petitioner as stated above does not have legs to stand. Rather, on the point as to whether a writ petition can be dismissed on the ground of availability of alternative remedy in case a disputed question of fact is involved in the matter, some useful reference could be made to a judgment of the Supreme Court reported in AIR 2005 SC 3454 in the matter of Mrs. Sanjana M. Wig vs. Hindustan Petro Corporation Ltd. (para 18)

> ". . . but while entertaining a writ petition even in such a case, the court may not lose sight of the fact that if a serious disputed question of fact is involved arising out of a contract qua contract, ordinarily a writ petition would not be entertained."

22. Thus, to meet the ends of justice, in view of the peculiar ticklish questions involved and in the absence of relevant documents to decide the point for determination and taking into consideration the rulings laid down by the Supreme Court in its decisions reported in (1997) 105 STC 318, (1983) 53 STC 315 and AIR 2005 SC 3454 (supra), it is imperative that this matter has to be looked into in

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its proper perspective. In such a view of the matter, this Court is of the considered view that only the appellate authority would be the appropriate forum to go deep into the matter and arrive at a proper conclusion, particularly in view of the fact that there are disputed questions of fact involved in this matter. However, the learned counsel for the petitioner has expressed apprehension that since the appellate authority, namely, the Assistant Commissioner of Commercial Taxes is a subordinate to the Deputy Commissioner and Commissioner of Commercial Taxes, the validity of the assessment cannot be made in an effective and unbiased manner. This contention of the counsel for the petitioner cannot be sustained because he has not produced any evidence, much less any clinching evidence, to prove that the Deputy Commissioner or the Commissioner had influenced the respondent in passing the impugned order.

Considering the facts and circumstances of the case, the discussion made above and the rulings of the Supreme Court on the aspect of exhaustion of alternative remedy, particularly the one reported in (1997) 105 STC 318 in Leukoplast case in which it has been held that statutory remedy cannot not be by-passed by filing a writ petition when a matter involves questions of fact which should be agitated before the statutory appellate authority, this Court is constrained to dismiss this petition, without going into merits of the case, on the ground that the petitioner has rushed to this Court by way of this writ petition without exhausting the alternative remedy available to it before the Assistant Commissioner of Commercial Taxes under Section 31 of the TNGST Act. However, the petitioner is at liberty to prefer an appeal under due process of law to get its grievance redressed, within a period of four weeks from the date of receipt of a copy of this order and it is made clear that the period of pendency of this writ petition need not be taken into account while considering the period of limitation for preferring the appeal. No costs. Consequently, connected W.P.M.P. is closed.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

cad

To

The Commercial Tax Officer
Rattan Bazaar
Assessment Circle
I Floor, Kuralagam Annexe
Chennai - 600 108

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